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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

REGENCY PALMS HOMEOWNERS ASSOCIATION,

Plaintiff and Appellant,

v.

ROBERT HUGHES,

Defendant and Respondent.

E037896

(Super.Ct.No. INC 034015)

OPINION

APPEAL from the Superior Court of Riverside County. Douglas P. Miller, Judge. Affirmed.

Peters & Freedman, Michael G. Kim, Johanna R. Deleissegues and Simon J. Freedman for Plaintiff and Appellant.

Law Offices of Matt H. Morris and Matt H. Morris for Defendant and Respondent

This action arises from defendant and respondent Robert Hughes violating various covenants, conditions & restrictions (CC&Rs) by parking his commercial vehicles in his residential driveway. The issue here is whether plaintiff and appellant Regency Palms

Homeowners Association (Association) was required to give Hughes notice of the right to participate in alternative dispute resolution (ADR) under Civil Code section 1354[1] before filing this lawsuit against Hughes. Association argues it was not required to give Hughes ADR notice because he was not the record title owner when Association filed suit. Although Hughes owned the property, he had not recorded the grant deed.

During an Evidence Code section 402 evidentiary hearing, the trial court found Hughes was entitled to, but did not receive, ADR notice under section 1354. As a consequence, the trial court dismissed Association's lawsuit against Hughes.

Association appeals judgment entered following dismissal of its lawsuit against Hughes. Association contends it fully complied with section 1354 ADR notice requirements. It gave the record owner, Arthur Hale, proper ADR notice, and was not required to give Hughes ADR notice.

We conclude Association was required under section 1354 to endeavor to resolve its dispute over CC&R violations through ADR with Hughes before suing him, and failed to do so. Consequently the trial court appropriately dismissed the action. The judgment is affirmed.

1. Factual and Procedural Background

Association is a nonprofit mutual benefit corporation and serves as a residential

[1] Unless otherwise noted, all statutory references are to the Civil Code.

owners association for a common interest development[2] in Palm Desert, known as Regency Palms, where the property in question is located. (§ 1351.) All properties within the development are subject to CC&Rs.

Defendant Robert Hughes has resided continuously at the property in question since 1993. He was the title owner from 1993 to 1996. In 1996, he sold the property to Arthur Hale. Hughes had done work on the Hales' gate. At the time, Hughes was having financial problems and suggested Hale buy his property as an investment. The Hales purchased the property but allowed Hughes to continue living in the home.

In 1998, Hale provided Association with written authorization allowing Hughes to represent him in all matters concerning the Association and the subject property.

In 2001, Hughes bought the property back from the Hales but did not record the deed because he did not want his creditors to know he owned the property.

In July 2002, Hughes allegedly violated Regency Palms CC&Rs by parking his commercial vehicles in his driveway and maintaining commercial signage on his trucks which was visible from the common areas. Association repeatedly sent notices of the violations, addressed to Hale as record owner, to Hughes's post office box. Hale had previously requested Association to send all correspondence to Hughes's post office box.

In August 2002, Hughes met with Association's board of directors and entered into an agreement to abate the parking and signage violations.

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[2] Within the meaning of section 1354, a "common interest development" includes a condominium project and planned development. (§§ 1351, 1354.)

In December 2002, Association personally served Hale at his home in Bermuda Dunes with a request for resolution, claiming Hale was still committing CC&R parking and signage violations. The request for resolution advised Hale that he had the right to resolve the dispute through ADR. Association did not send a copy of the request for resolution to Hughes's post office box or provide a copy to Hughes.

Hale did not respond to the request for resolution. As a consequence, in February 2002, Association filed the instant lawsuit against Hale and Hughes for breach of covenant (the CC&Rs), and injunctive and declaratory relief. Association alleges in its complaint that it served "defendants" with a request for resolution pursuant to section 1354, and defendants failed to respond. Attached to the complaint is a certificate of compliance, consisting of a declaration by Association's attorney, stating that on December 15, 2002, a request for ADR was served on Hale, and Hale failed to respond.

In April 2003, after Association filed the instant lawsuit, Hughes sent Association's attorney a copy of his grant deed showing he owned the property.

On May 16, 2003, Hughes demurred to the complaint on the ground Association did not serve him with a request for resolution before filing the instant lawsuit, as required under section 1354. Association filed opposition, arguing that it served the record owner, Hale, with a request for ADR, and Hughes did not inform Association he was owner until after the lawsuit was filed. Association claimed it therefore had complied with section 1354 and Hughes should not be rewarded for acting in bad faith by not recording his grant deed. Association further argued it would be substantially prejudiced if the demurrer was sustained because Association would be barred from

enforcing its CC&Rs against Hughes and prevented from enforcing them equally against all owners.

There was no argument during the hearing on the demurrer in June 2003. The court simply announced its ruling overruling the demurrer, without providing any explanation. Thereafter, Hughes and Hale answered the complaint. The matter was arbitrated in October 2003, with an award in favor of defendants. Association filed a request for trial de novo, and the court set the matter for trial.

In February 2004, Association dismissed Hale from the lawsuit.

Before commencing the trial, the trial court heard Association's motion in limine asserting that Hughes was judicially estopped from claiming Association failed to comply with section 1354 by not serving Hughes with ADR notice. Association asserted that the contention had already been considered and rejected when the trial court (a different judge) overruled Association's demurrer.

During the motion in limine hearing, the trial court judge noted that it did not know why the demurrer was overruled. The court concluded that, since it may have been overruled because the judge concluded the complaint's allegations were sufficient, and since compliance with section 1354 required factual determinations, the ruling on the demurrer was not dispositive.

The parties agreed to the court deciding the section 1354 issue during an Evidence Code section 402 evidentiary hearing (402 hearing) before proceeding with the trial. The parties further stipulated that Hale was served with an ADR request; title to the property was transferred to Hughes in 2001; and Hale was the record owner from 1996 until June

2003, when Hughes recorded his grant deed.

During the 402 hearing, Hughes and the Association's property manager, Martha Osborne Larby (Osborne) testified as follows.

Hughes's Testimony

Hughes testified that in 2002, Hughes received Association notices that he was violating the CC&Rs by parking his commercial trucks at the property. The notices were addressed to Hale but sent to Hughes's post office box. Hughes contacted the Association and, as the owner of the property, met with several Association board members in August 2002 to resolve the complaints about commercial signs on his trucks and parking the trucks in his driveway.

After reaching an agreement on the matter, Association did not send any additional violation notices to Hughes's post office box or notify him in any other way of any violations. Hughes did not receive any correspondence from the Association after entering into the agreement.

He also did not have any conversations with the Hales concerning the Association prior to the lawsuit. Hughes did not discuss the violations with Hale or have any correspondence with him. The last time he spoke to Hale was when he purchased the property back from Hale in 2001. Hale did not send him a copy of the request for resolution (ADR notice). The first time Hughes saw a copy of the ADR notice sent to Hale's home address was when Hughes received a copy of Association's lawsuit in January 2003.

According to Hughes, before the August 2002 meeting, he told Association board

members numerous times he had a grant deed to the property and owned it. Prior to the instant lawsuit, he also told Association's manager, Martha Osborne, that he had a grant deed to the property. She responded that she did not care. The Association only went by what was recorded.

Hughes ultimately recorded his grant deed in June 2003 because he wanted to refinance his home.

Osborne's Testimony

Marsha Osborne testified that she had been Association's property manager throughout the proceedings involving Hughes. Association's records reflected that Hale was the record owner of the property when Association filed the instant lawsuit in February 2003. Association also did a title search in April 2003, which confirmed Hale was the record owner. Association sent all violation notices only to the record owner, who in this case was Hale. Before Association filed its lawsuit, Hughes never told her he was owner of the property.

During the August 2002 meeting, Hughes did not say he was *record* owner. Prior to the lawsuit, Osborne believed Hughes resided at the property and, pursuant to a note from Hale, was authorized to represent Hale in Association matters. Osborne first became aware Hughes owned the property in April 2003, when Association's attorney showed her an unrecorded grant deed in Hughes's name.

Osborne knew Association's notices were being sent to Hughes's post office box, but in Hale's name. Pursuant to the CC&Rs, she only recognized the record owner concerning Association matters. Osborne did not recall whether she told Hughes she

would not address the Association notices to Hughes, rather than to Hale, because Hughes was not record owner of the property. Osborne believes she did not have such a conversation with Hughes.

After Association and Hughes entered into the August 2002 agreement concerning the parking violations, Osborne never notified Hughes personally or in writing of any subsequent violations. She also never sent him any request for resolution concerning any continuing disputed matters.

Following testimony and lengthy oral argument during the 402 hearing, the trial court found there was no evidence Hughes acted in bad faith or "sandbagged" Association by not recording the grant deed; both witnesses were credible; and it was unclear whether Association knew Hughes was owner before filing suit. The court further found that Association had failed to comply with section 1354, and any prejudice Association might suffer from dismissal of the action was outweighed by Hughes's prejudice in being deprived of the opportunity to resolve the dispute through ADR. Accordingly, the trial court dismissed the action based on Association's noncompliance with section 1354.

2. Noncompliance With Section 1354

Association contends that because its CC&Rs define "owner" as the "record owner," Association fully complied with section 1354 by serving the record owner, Hale, with a request for resolution. Although Hughes held title to the property, he was not record owner prior to Association filing the instant lawsuit. Association argues that, since Hughes was not record owner, Association was not required under section 1354 to

serve Hughes with a Request for Resolution before suing him. We disagree.

While we have little sympathy for those, such as Hughes, who play fast and loose with their creditors by attempting to conceal real property ownership by not recording their grant deeds, we nevertheless do not deem it appropriate to disregard section 1354 by not requiring Association to comply with section 1354's requirement to endeavor to mediate the instant dispute with all parties to the dispute, including Hughes.

Section 1354 requires that before a homeowners association can file certain types of lawsuits to enforce CC&Rs, it must endeavor to resolve the matter by ADR. The version of section 1354 applicable to this matter provides in relevant part as follows: "(b) *[P]rior to the filing of a civil action by either an association or an owner or a member of a common interest development* solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, not in excess of five thousand dollars ($5,000), *related to the enforcement of the governing documents* [such as the CC&Rs], *the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration*. The form of alternative dispute resolution chosen may be binding or nonbinding at the option of the parties. *Any party to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution*. . . . Parties receiving a Request for Resolution shall have 30 days following service of the Request for Resolution to accept or reject alternative dispute resolution and, if not accepted within the 30-day period by a party, shall be deemed rejected by that party. . . . The costs of the alternative dispute resolution

shall be borne by the parties." (Italics added.)

Subdivision (c) of section 1354 provides in pertinent part that, "At the time of filing a civil action by either an association or an owner or a member of a common interest development solely for . . . declaratory relief or injunctive relief in conjunction with a claim for monetary damages . . . , *the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed* in compliance with subdivision (b). The *failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer* pursuant to Section 430.10 of the Code of Civil Procedure *or a motion to strike* pursuant to Section 435 of the Code of Civil Procedure *unless* the filing party certifies in writing that one of the other parties to the dispute refused alternative dispute resolution prior to the filing of the complaint . . . , or *the court finds that dismissal* of the action for failure to comply with subdivision (b) *would result in substantial prejudice* to one of the parties."[3] (Italics added.)

In the instant case, Association served a Request for Resolution on Hale at his home address. According to Hughes, Hughes never saw the request or a copy of it and was unaware it had been sent to Hale. Association never served Hughes with a request for resolution. Association claims it was not required to do so because Hughes was not record owner of the property when Association filed the instant lawsuit.

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[3] The 2004 amendment to section 1354, relocated and revised subdivisions (b)-(e) and (g)-(j) relating to alternative dispute resolution, as sections 1369.510-1369.570, and 1369.590 (alternative dispute resolution). (See Cal. Law Revision Com. com., 8 West's Ann. Civ. Code (2006 pocket part) foll. § 1354, p. 101 and 33 Cal.L.Rev.Comm. Reports 707 (2004)).

There appears to be no case law on point. Although the appellant in *Cabrini Villas Homeowners Assn. v. Haghverdian* (2003) 111 Cal.App.4th 683 argued that the failure to submit a CC&R dispute to ADR constituted failure to exhaust an administrative remedy and thus deprived the court of subject matter jurisdiction, the *Cabrini* court did not address the issue. Rather, the court concluded service of the request for resolution was proper and thus the plaintiff complied with section 1354 ADR requirements. There being no case on point, we look to the language and intent of section 1354 in construing and applying section 1354 in this appeal. In doing so, we conclude that, as a party to the dispute and as the property owner, Hughes was entitled under section 1354 to receive ADR notice of the right to participate in ADR. We reject Association's contention that it was not required to comply with section 1354 because Hughes was not a record owner.

Association knew that Hughes was living on the premises in question. Hale had authorized Hughes to represent him in all matters concerning the Association as early as July 2002. Hughes had met with the Association in August 2002 over its request to abate the parking violation. Leaving aside Hughes's claim that he had notified the Association that he was the actual owner of the property, the Association knew that at the very least Hughes had an interest in the property.

Despite the Association's knowledge of Hughes's residency on and interest in the property, and despite Hale's direction that the Association send all correspondence to Hughes's post office box, when it came time to notify the owner of the property of the Association's desire for alternative dispute resolution, Association notified only Hale. It then filed a certificate with the trial court under section 1354, subdivision (c) indicating

that it had sought alternative dispute resolution and it had been rejected.

Construing section 1354 as limited to applying only to associations and record owners would result in too narrow a construction of section 1354, contrary to the Legislature's intent of encouraging ADR before resorting to litigation. (*Cabrini, supra,* 111 Cal.App.4th at p. 691.) As noted in *Villa Milano Homeowners Assn. v. IL Davorge* (2000) 84 Cal.App.4th 819, 834-835, "Clearly, the Legislature has contemplated alternative dispute resolution with respect to the enforcement of CC&R's as equitable servitudes and has chosen to encourage alternative dispute resolution only with respect to certain limited kinds of disputes, i.e., those seeking declaratory relief, injunctive relief, or either declaratory or injunctive relief in combination with a damages claim not to exceed $5,000." The instant lawsuit falls within this category of disputes and thus Association was required to comply with section 1354 ADR notice requirements.

In construing section 1354 consistent with the legislative purpose of the statute, and in "giving to the language its usual, ordinary import and according significance," we construe section 1354 in its ordinary common sense and not as being limited to a record owner. (*Cabrini, supra,* 111 Cal.App.4th at p. 689.) We construe section 1354 "'in a reasonable and commonsense manner consistent with the legislative intent. [Citation.]' [Citation.] The interpretation must be practical, resulting in '"'wise policy rather than mischief or absurdity. . . .'"' [Citation.]'" (*Villa Milano Homeowners Assn. v. IL Davorge, supra,* 84 Cal.App.4th at p. 831.) In doing so, we conclude Association was required to endeavor to resolve the dispute with Hughes as a party to the dispute by serving him with a request for resolution.

The fact that Association defines "owner" in its CC&Rs as "record owner" has no bearing on the application of section 1354 to the instant matter. Within the meaning of section 1354, Hughes was an "owner" and also a party to the dispute, and thus Association was required to serve him with a request for resolution.

Association argues that before it filed suit, it was unaware Hughes was owner of the property due to Hughes not recording the grant deed. Even assuming this were true, this does not justify not serving Hughes with a request for resolution under section 1354. While section 1354, subdivision (a) limits those who may enforce CC&Rs, there is no such limitation as to who must be advised of the right to participate in ADR concerning CC&R violations.

Under section 1354, any party to a CC&R dispute under section 1354 must be served with a request for resolution, regardless of whether the party is an owner or association member. This includes Hughes, even assuming Association did not know he owned the property when Association filed suit. He clearly was a party to the dispute. Association initially met with him in August 2002 and entered into an agreement with Hughes to abate the violations. Then, without endeavoring to resolve alleged subsequent violations through ADR with Hughes, Association filed the instant lawsuit against him. Association was required to serve Hughes, as a party to the dispute, with a request for resolution before suing him.

Section 1354 contains language indicating the statute was not intended to be limited to owners. There are repeated references in subdivisions (b) and (c) to the "parties" to the dispute. For instance, subdivision (b) states that, before filing suit under

section 1354 to enforce CC&Rs, "the *parties* shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution" and "*Any party to such a dispute* may initiate this process by serving on *another party to the dispute* a Request for Resolution." (§ 1354, subd. (b); italics added.)

Such references in section 1354 to the parties to the dispute indicate the effort to resolve CC&R disputes by ADR is not necessarily limited solely to the Association and record owners. ADR efforts are to be endeavored as to all those who are *parties* to the dispute in furtherance of avoiding litigation. This includes Hughes, regardless of whether Association knew he was a property owner.

The trial court thus erred in overruling Hughes's demurrer without stating any grounds for its ruling. Section 1354, subdivision (c) provides that the failure of the plaintiff to file a certificate stating ADR has been completed in compliance with subdivision (b) shall be grounds for a demurrer or motion to strike unless the plaintiff certifies in writing certain specified circumstances not pertinent to the instant case or the court finds that dismissal for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties. Rather than overruling the demurrer, the court should have sustained Hughes's demurrer on the ground Association failed to serve him with a request for resolution.

Little weight should be given to the fact that the trial court overruled Hughes's demurrer. Relying upon the certification of the Association that one of the other parties to the dispute had refused alternative disputes resolution, the trial judge had no alternative but to deny the demurrer.

Due to the trial court's failure to sustain Hughes's demurrer and dismiss the action, the matter proceeded to trial and the trial judge (a different judge) dismissed the action based on noncompliance with section 1354, following an evidentiary 402 hearing on the matter.

Association contends that, because the court overruled Hughes's demurrer, the trial judge was precluded from holding a factual hearing at the time of trial to determine whether Association complied with section 1354.

We conclude that, although normally compliance with section 1354 should be determined at the pleading stage by demurrer or a motion to strike, before the matter has been fully litigated, the trial court appropriately exercised its discretion in conducting an evidentiary hearing on the matter at the time of trial. There is no language in section 1354 precluding the trial court from doing so, whereas subdivision (i) of section 1354 and the statute as a whole indicate that a plaintiff may lose its right to bring a lawsuit to enforce CC&Rs due to noncompliance with section 1354.

Section 1354, subdivision (i), provides that an association is required to provide its members annually with a summary of the provisions of section 1354, which shall include the following statement: "'"Failure by any member of the association to comply with the prefiling requirements of Section 1354 of the Civil Code may result in the loss of your rights to sue the association or another member of the association regarding enforcement of the governing documents."'" (§ 1354, subd. (i).)

We thus conclude the trial court appropriately exercised its discretion to hold an evidentiary hearing at the time of trial to resolve the factual and legal dispute whether

there was compliance with section 1354. Evidence presented at the 402 hearing established Association failed to comply with section 1354 and that dismissal would not result in substantial prejudice to the parties since Association could refile if necessary, whereas the deprivation of Hughes's right to ADR outweighed any prejudice suffered by Association. Both parties incurred litigation costs and there was no evidence dismissing the action and submitting the matter to ADR would increase litigation costs significantly more than if the matter were not dismissed. In fact, Association's litigation costs, as well as those incurred by Hughes, would be significantly reduced if the parties succeeded in resolving the matter through ADR.

We conclude dismissal of the action was proper following the 402 hearing since it was clear Association had not complied with section 1354 and could refile its action if the parties failed to resolve the matter through ADR.

3. Disposition

The judgment is affirmed. The parties shall bear their own costs on appeal.

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s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/King
J.